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In The

Supreme Court of the United States

October Term, 1983

FORTUNATO INZONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, due process is denied when (i) the defense established during the trial that the conspiracy was terminated in four different ways; (ii) the defense of termination started with the openings and was pressed throughout the trial; and (iii) a written request to charge on termination was submitted yet the court refused to charge on termination.

2. Whether, a co-conspirator's statement communicated to others in the conspiracy, that the government had defeated the object of the conspiracy by confiscating the box which was the object of the importation, is binding on the conspirators as a statement of declaration of termination of the conspiracy in the same manner as a statement in furtherance of a conspiracy.

3. Whether, due process requires that a court must charge on flight when (i) flight is a major portion of the prosecutor's case; (ii) the defendant makes a single appearance at a time when the conspiracy is terminated; (iii) substantial objection to the flight evidence was made; (iv) the defense submitted a written request to charge on flight; and (v) the court agreed to charge on flight and then failed to do so.

4. Whether, the Court should now establish a uniform test to determine whether there is sufficient evidence exclusive of hearsay, *i.e.*, evidence *aliunde* to allow a defendant to be connected to the conspiracy.

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Reasons for Granting the Writ:

I. The instant case will afford the Court an excellent opportunity to examine, discuss and settle the law concerning the termination of a conspiracy. The issue is ripe for consideration for the following reasons:

1. Its importance in the defense and prosecution of conspiracy cases;

2. The lack of settled rules and the divergent opinions of courts; and

3. The length of time since this Court last addressed the issue directly. 8

A. The petitioner relied on the defense of termination from the outset. 11

B. The case was tried on the defense throughout. 11

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Is a statement by a co-conspirator, conveyed to the other co-conspirators admissible to prove termination? This is the reverse of a statement by a co-conspirator admissible because it furthers the conspiracy.

Research has not revealed any authority on this issue. The Court of Appeals failed to decide it. This Court should decide the issue because of its importance in the ever broadening use of conspiracy prosecutions. 17

III. In light of the Court's lack of confidence in the probative value of flight evidence as expressed in *Wong Sun v. United States,* 371 U.S. 471 (1963) the Court should clearly set forth guidelines concerning the admission of flight and the manner in which it should be charged to juries thereby bringing all the circuits into harmony..... 19

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No.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Fortunato Inzone respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 27, 1984. The court amended the opinion on April 10, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto along with the amended opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 27, 1984. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment:

> Section 1 — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner Fortunato Inzone was indicted on March 20, 1980 in the Eastern District of New York. Petitioner was charged in Indictment No. 80 CR. 131 (5)4 with conspiracy in violation of 21 U.S.C.A. §963 (Count One) and importation of heroin in violation of 21 U.S.C.A. §962(a) and 960(a)(1) and 18 U.S.C.A. §2 (Counts Two and Three). After six days of trial, petitioner was found guilty of Counts One and Three. The court sentenced the petitioner to an aggregate sentence of 15 years imprisonment and a $20,000 fine to be followed by a lifetime of supervision on parole.

Petitioner filed a timely notice of appeal in the United States Court of Appeals for the Second Circuit on November 16, 1983. Oral argument was heard on March 23, 1984 and the judgment of conviction was affirmed on March 27, 1984.

The factual underpinning of this case can be clearly outlined by a careful examination of the government's chief witness Francesco Rolli. His testimony encompasses the complete life of the conspiracy.

Rolli was employed as a cargo worker at Alitalia Airlines. Near the end of June or July 1979, Rolli was contacted by Paul Zinerco (T22).[1] Zinerco approached Rolli with a plan to by-pass the Customs officials in return for a fee. Zinerco informed Rolli that they (Rolli and Zinerco) would receive $7,000 per pound for each shipment they could deliver to a certain party. This first conversation initially only involved Zinerco and Rolli and took place at Zinerco's bakery (T17). However, after leaving the bakery and walking to a cafe on Knickerbocker Avenue in Brooklyn, a third participant, Antonio Silvestrini, joined this conversation. Silvestrini discussed the ways in which the goods could be brought into the country and the proposed by-pass of Customs. Silvestrini also agreed to determine if a higher price could be paid to Zinerco and Rolli, and if the goods could be shipped from a port of origin other than Palermo, Sicily (T19).

A. First Shipment

Between August 8th and 10th, Zinerco contacted Rolli that a shipment was expected shortly. Zinerco advised Rolli of the airway bill number and that the package must by-pass Customs. Since Rolli anticipated that the box would arrive on his weekend

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1. All page references designated T refer to Transcript of Testimony of Francesco Rolli dated September 21, 1983.

off he enlisted the aid of John Egitto, a co-worker. The box arrived on August 13, 1979 and through the efforts of Zinerco, Rolli and Egitto, Silvestrini received the box unnoticed by Customs (T20-21). The box had been shipped to Maria Canale, 1571 Dekalb Avenue, Brooklyn. The name and address were fictitious.

Zinerco and Rolli were paid $7,000 and were told the shipment was a test. The money was evenly divided by Zinerco and Rolli, with Rolli giving Egitto a small amount (T25-26). Both Zinerco and Rolli were upset with the small payoff, however they agreed to do it again with the understanding a substantial amount would be shipped.

B. Second Shipment

On or about August 27, a box was shipped from Palermo via Alitalia to the same fictitious name and address as that which was placed on the first box. Again Zinerco contacted Rolli advising him that the shipment would arrive in several days. Again Rolli anticipated the box would arrive on his day off (T27-28). Again Rolli enlisted the aid of Egitto to clear the box. The shipment arrived in the United States on August 28, 1979. The box was checked in and assigned to Bin A-132. That bin is within the lower level of bins in which packages are stored. Egitto, on Rolli's instructions, moved the box to Bin C-147 which is within the top row of bins. The move was made to avoid detection by specially trained dogs that are utilized to "smell out" drugs (T72-73).

On August 29, 1979, the package was seized by the government because the government was advised by an Alitalia employee that the name and address on the package were fictitious. The employee determined this because a confirmation slip respecting the first box was returned. The agents who seized the package emptied it, inspected it, refilled it with paper and replaced it on the shelf of Bin C-147, as a lure. Rolli traveled to the

warehouse and noticed that the box was located in a position not likely to have been selected by Egitto. Rolli's suspicions were enhanced when he was advised by Zinerco that a D.E.A. agent, John Gartland had earlier been at the warehouse (T32). Rolli told Egitto not to touch the package because it was hot.

On August 31, 1979, Rolli observed Agent Gartland remove the package from its resting place in Bin C-147. Rolli informed Zinerco that the government had seized the package. *That message was intended to convey to Zinerco that the scheme had been defeated and was now terminated.* Rolli left for vacation thinking the entire episode was over. On Rolli's return on September 6, 1979 he was informed by Zinerco that there was so much distress about the package "a meeting was requested". Rolli was told to produce Egitto. Thereafter, a series of six meetings commenced.

(i) September 7, Meeting at a Gas Station

The first meeting was convened at a gas station on the Belt Parkway on September 7, 1979. Present were Rolli, Zinerco, Silvestrini, Don Luigi LoBue, Salvatore Calabria (Toto) and Giuseppe Vallelunga (T33-34). The meeting was controlled by LoBue, who did not believe the box was seized by the government. LoBue questioned Zinerco, Silvestrini and Rolli. He wanted proof of the seizure. Calabria admonished Zinerco and Rolli that he was the only one who dealt with the kind of stuff in the package. So if they stole it he would find out (T34-35a).

Thus, as of September 7, 1979, two conflicting groups had formed. Rolli, Zinerco and Egitto were accused by the others of stealing the box.

The groups were as follows:

THE ALITALIA GROUP	THE OTHERS
1. Zinerco	1. Don Luigi LoBue
2. Rolli	2. Giuseppe Vallelunga
3. Egitto	3. Nino Silvestrini
	4. Salvatore Calabria (Toto)

(ii) September 8, Meeting at Salvatore Gallina's House

The second meeting occurred September 8, 1979 at Gallina's house. Present were Rolli, Egitto, Silvestrini, LoBue, Sal Gallina, Vallelunga, Calabria and petitioner Inzone. LoBue also conducted this meeting along with Calabria. The meeting again centered around the lost package. According to Rolli, the other people merely repeated LoBue's questions. LoBue's purpose was to find out where the package went. He was convinced that someone in the Alitalia Group took it. The Alitalia Group tried to persuade LoBue that the scheme had been defeated by the government. On September 8, 1979, the two groups were comprised as follows:

THE ALITALIA GROUP	THE OTHERS
1. Zinerco	1. Don Luigi LoBue
2. Rolli	2. Giuseppe Vallelunga
3. Egitto	3. Nino Silvestrini
	4. Salvatore Calabria
	5. Sal Gallina
	6. Fortunato Inzone

(iii) September 11 or 13, Meeting Between Rolli and Zinerco at Zinerco's Residence

Rolli was summoned to Zinerco's home. Zinerco told him he (Zinerco) was physically abused by the others and that "they" did not include petitioner. These acts were undertaken in conjunction with renewed questioning respecting the previously seized box (T55-57).

(iv) September 15, Meeting at the Santa Rosalia Club

Rolli was informed by Zinerco that certain people were going to help them resolve their problems. To this end, Rolli, Egitto and Zinerco met with Emanuele Adamita (T58-59). Adamita brought them to the Santa Rosalia Club above the Cafe Valentino. There along with Rosario Gambino and Sal Inzerelli, Adamita questioned Rolli, Zinerco and Egitto. The three men told the Alitalia Group that they had no interest in the package. The Alitalia Group again told the story of the government's seizure of the package.

(v) September 19 or 20, Meeting at the Santa Rosalia Club

Rolli returned to the Santa Rosalia Club and presented documentation that the package had indeed been seized by the government.

(vi) September 23 or 24, Meeting at the Santa Rosalia Club

Rolli delivered the name of the manager at Alitalia who alerted the government about the package.

At the trial the government introduced evidence of flight by petitioner. Also a stipulation as to the existence of certain toll call records was also introduced.

FLIGHT

The government produced Special Agent John F. Larson to testify that on April 10, 1983 he encountered petitioner in Davey, Florida. Petitioner responded to the agent that his name was Tony Brofa. Petitioner also possessed a Florida driver's license with the name Antonio Bafa. The original indictment was retained on March 20, 1980 and a bench warrant was issued on that day.

REASONS FOR GRANTING THE WRIT

I.

THE INSTANT CASE WILL AFFORD THE COURT AN EXCELLENT OPPORTUNITY TO EXAMINE, DISCUSS AND SETTLE THE LAW CONCERNING THE TERMINATION OF A CONSPIRACY. THE ISSUE IS RIPE FOR CONSIDERATION FOR THE FOLLOWING REASONS:

1. ITS IMPORTANCE IN THE DEFENSE AND PROSECUTION OF CONSPIRACY CASES;

2. THE LACK OF SETTLED RULES AND THE DIVERGENT OPINIONS OF COURTS; AND

3. THE LENGTH OF TIME SINCE THIS COURT LAST ADDRESSED THE ISSUE DIRECTLY.

Justice Harlan clearly warned the government that the Supreme Court would look unfavorably at attempts to broaden conspiracy prosecutions. He said in part:

> "We will view with disfavor attempts to broaden the already pervasive and sweeping nets of conspiracy prosecutions." *Grunewald v. United States,* 353 U.S. 391 (1967) at p. 404.

Since the Court's decision in *Grunewald, supra,* there has been a substantial increase in the use of conspiracy prosecutions both on a state and federal level. The question of when the conspiracy ends is important for three reasons all of which may effect each case:

1. Only statements made during the course of the conspiracy can be admissible under the rule concerning declarations by co-conspirators. *United States v. Kelly,* 526 F.2d 615 (8th Cir. 1975), *cert. denied,* 424 U.S. 971;

2. A conspirator will be responsible for all acts committed by co-conspirators in furtherance of the conspiracy so long as they are committed prior to the termination of the conspiracy. *Pinkerton v. United States,* 328 U.S. 640 (1946);

3. For statute of limitation purposes.

Because of the rise in conspiracy prosecutions and the importance of the termination issue the Court should set guidelines for state and federal courts.

This case affords the Court a unique opportunity to examine the termination issue and set guidelines for other courts. This is so for the following reasons:

1. The petitioner relied on the defense of termination from the outset.

2. The case was tried on that defense throughout. The defense proved termination in four different ways.

3. The proof of termination came from the government's key witness Francesco Rolli.

4. The petitioner specifically requested a charge on termination and was refused.

5. Co-conspirator hearsay was admitted against the petitioner after the termination of the conspiracy.

The Court should examine each one of the above statements to determine the importance of the issue of termination in this case.

Individuals who enter into a conspiracy do not bind themselves together indefinitely as conspirators, making each responsible for the acts of the others forever, but only for the duration of the conspiracy. A conspiracy may terminate in one of the following ways. It may terminate by reason of its own terms, naturally upon completion of its object or its defeat, voluntarily by abandonment, by affirmative acts of withdrawal or by arrest or death. *See, e.g., Fiswick v. United States,* 329 U.S. 211, 217 (1946); *Sandez v. United States,* 239 F.2d 239 (9th Cir. 1956); *United States v. Chase,* 372 F.2d 453 (4th Cir. 1967); *People v. Leach,* 541 F.2d 296, 303 (Sup. Ct. Calif. 1979).

It has also been stated in the Model Penal Code Sec. 503(7)(a) that:

> "Conspiracy is a continuing course of conduct which terminates unless the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired."

Cf., Marcus, *Prosecution and Defense of Criminal Conspiracy Cases,* Sec. 505(1); *United States v. Green,* 594 F.2d 1227 (9th Cir. 1979), *cert. den.,* 444 U.S. 853 (1979).

A. The petitioner relied on the defense of termination from the outset.

Petitioner alerted the court that since the imported box was seized by the government no later than August 31, 1979 and the petitioner's first and *only appearance* was on September 8, 1979 he would rely on the fact that the conspiracy terminated long before his appearance. The petitioner opened to the jury on the theory that the criminal activity terminated before he appeared on the scene. He then:

1. Submitted a trial memorandum outlining the defense (Appendix, 8a);

2. Argued at the end of the government's case for a directed verdict on the theory of termination;

3. Argued at the end of the entire case on the theory of termination; and

4. Submitted a written request for a charge on termination along with a memorandum of law (Appendix, 18a).

B. The case was tried on the defense throughout.

The petitioner opened, as previously stated, on the theory that the conspiracy ended before the petitioner's involvement.

The cross-examination and summation were also designed to demonstrate the termination. Counsel attempted to prove the conspiracy terminated no later than August 31, 1979. Each of counsel's questions to Mr. Rolli were designed to show that the essential elements constituting a conspiracy could only be found up and until the shipment was finally seized by the government.

C. The proof of termination came from the government's key witness, Francesco Rolli.

Through the testimony of Francesco Rolli the jury was given several grounds upon which they could have determined that as of September 8, 1979 the conspiracy terminated:

1. Self destruction by its own terms;

2. Defeat of its object by government action;

3. Termination by Rolli's observance of the government confiscation of the box and communication of that knowledge to the other conspirators; and

4. Termination by virtue of dissention among participants.

(1) Rolli's testimony showed the agreement was on a shipment by shipment basis because he would have to renew the conspiracy by giving a separate okay for each shipment. Under these circumstances, it is clear that there was no agreement for continual shipments and each shipment was to be subject to his approval. Consequently, upon shipment of the second box received at Alitalia on August 28, and confiscated by the government on August 29, the conspiracy self-destructed. Rolli would never agree to any further shipments and, therefore, after August 29, 1979 no conspiracy could take place.

(2) The government defeated the conspiracy when it seized the second shipment on August 29, 1979. The testimony was clear and unequivocal that the government seized the package and replaced it with a decoy package. Rolli knew of the government's *tampering* as early as August 29, 1979. He testified that he communicated that knowledge to the Alitalia Group immediately.

We submit that the communication of his knowledge if imputed to his co-conspirators would terminate the conspiracy.

(3) Rolli communicated that the package was seized finally by the government on August 31. Rolli had observed its seizure and warned everyone in the Alitalia Group. Rolli's exact words bear repeating:

> "Q. That date when you saw Agent Gartland remove the box, that is August 31st is that correct? A. Yes sir, I believe so.
>
> Q. You told Mr. Zinerco didn't you? A. Yes.
>
> Q. And you knew the package was officially seized and this thing would have to be put down as a loss, is that correct? A. That is one way of saying it yes.
>
> Q. Now you told Mr. Zinerco when? A. I think I told him the same day, if I got a chance to get in touch with him.
>
> Q. Did you tell him again after the 31st of August and before you went off on Labor Day Weekend? A. I don't remember how many times I spoke with him. *I told him the package had been taken away by the agent and to me the whole thing was up and out and closed.*
>
> Q. You do agree it was all over. A. Yes, as a matter of fact I said it myself.
>
> Q. That is what you told Paul Zinerco? A. Yes." (T84).

(4) The facts adduced showed that from August 31 onward there was anything but agreement between the conspirators. Instead of working in harmony for a common purpose two distinct factions emerged, the Alitalia and the others. The fighting, threats and violence showed clearly the termination of the conspiracy to import as of August 31. It is axiomatic that in order for a conspiracy to exist the members must be working for a common scheme or purpose.

D. The petitioner specifically requested a charge on termination and was refused.

The petitioner requested both by written notice, and orally, at a charge conference, that the court charge the law of termination. The court refused. Examination of the evidence adduced at trial clearly establishes that no meaningful decision as to the petitioner's guilt could be made by the jury in the absence of an instruction respecting the law of termination. The jury had no means to accurately assess the impact of those facts in the context of its consideration of petitioner's culpability. This inability stemmed directly from the failure of the court to instruct the jury as to termination. The jury, in essence, was deprived of the ability to make a finding as to a critical element of the offense, vis the existence of the conspiracy to import at the time of petitioner's appearance at a meeting. *See United States v. Brown,* 555 F. 2d 407, 420 (5th Cir. 1977). (We suggest that the conspiracy had already terminated not later than August 31, 1979. Petitioner made his sole appearance in this case on September 8, 1979.)

It should be crystal clear in addition to being an integral part of the right to a fair trial, a proper charge bears a symbiotic relationship to the right to trial by jury — a right which is designed to insure impartiality. Associate Justice Vinson's oft quoted words are on all fours:

> "It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge who knows the law as to have a jury of his peers. The latter is supposed to safeguard our institution of fair trial by insuring impartiality. But of what value is an open mind, if it does not know, with clear delineation the issues upon which it is to pass judgment? Just as a lawyer might be ignorant in a meeting of scientists, so may a juror be in his casual acquaintance with the law. The jury, a group of reasonable citizens, is entitled to this legal instruction if it must accept the duty of passing upon the very life and death of a man. The law requires it." *Williams v. United States,* 131 F. 2d 21, 23 (D.C. Cir. 1942).

The right to a proper charge (i) encompasses "instructions relating to a theory of defense for which there is any evidence even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility." *United States v. Young,* 446 F. 2d 160, 164 (5th Cir. 1972) quoting *Tatum v. United States,* 190 F. 2d 612, 617 (D.C. Cir. 1950); and (ii) requires "a plain and clear exposition of the issues."

We submit in this case the failure to correctly charge on a consistent wholesome defense convicted the petitioner. The entire case was tried on the theory of termination yet the court left the jury uninstructed on this theory.

E. Co-conspirator hearsay was admitted against the petitioner after the termination.

The basic rule is that before a co-conspirator's declaration will be admissible against his fellow conspirators it must be proved that the declaration was made during the course of the conspiracy.

See United States v. Smith, 520 F. 2d 1245, 1247 (8 Cir. 1975); *United States v. Jennings,* 527 F. 2d 862 (5 Cir. 1976).

In the instant matter because of the failure of the court to instruct on termination two independent instances of highly prejudicial hearsay were admitted against the petitioner:

1. Statements by Paul Zinerco to Francesco Rolli (testified by Rolli) concerning a beating Zinerco received by members of the other group;

2. Statement by Emanuele Adamita to Francesco Rolli (testified by Rolli) concerning the possible killing of John Egitto.

Both of these statements post-dated the termination of the conspiracy and should not have been admitted.

II.

A QUESTION OF FIRST IMPRESSION AND OF MAJOR MAGNITUDE IS PRESENTED IN THIS CASE.

> **IS A STATEMENT BY A CO-CONSPIRATOR, CONVEYED TO THE OTHER CO-CONSPIRATORS ADMISSIBLE TO PROVE TERMINATION? THIS IS THE REVERSE OF A STATEMENT BY A CO-CONSPIRATOR ADMISSIBLE BECAUSE IT FURTHERS THE CONSPIRACY.**

RESEARCH HAS NOT REVEALED ANY AUTHORITY ON THIS ISSUE. THE COURT OF APPEALS FAILED TO DECIDE IT. THIS COURT SHOULD DECIDE THE ISSUE BECAUSE OF ITS IMPORTANCE IN THE EVER BROADENING USE OF CONSPIRACY PROSECUTIONS.

In our considered view this case raises a most substantial and novel issue of law. The evidence at trial established that the key conspirator (Rolli) communicated to his co-conspirators actual knowledge, gained by personal observation that the government confiscated the box on August 31, 1979 and thereby defeated the object of the conspiracy to import. This factual complex gives rise to two novel questions in the context of the law respecting admissibility and use of co-conspirator statements.

These issues are:

1. Whether Rolli's observance of the government's seizure of the box and defeat of the object of the conspiracy, once communicated to the other conspirators is binding on the conspirators?

2. Whether the statement of Rolli declaring termination binds the co-conspirators in the same manner as a general statement in furtherance of the conspiracy?

We submit that each of these questions must as a matter of fairness be answered in the affirmative. Therefore, after Rolli learned of the seizure, his knowledge communicated to the co-conspirators would bind his confidants.

If we are correct once the observation of Rolli is made known to the other co-conspirators, the others know the seizure by the government has taken place and the conspiratorial object to import is defeated. Thus the conspiracy must be over.

If the co-conspirators disbelieve but have the knowledge imputed to them the co-conspirators become antagonists and again the conspiracy is over.

We asked the court to instruct the jury that these communications concerning the defeat of the conspiracy and, therefore, the termination of the conspiracy were imputable to the petitioner. The court refused. If the court correctly instructed, the petitioner's presence on September 8, 1979 would have been with the knowledge that the conspiracy terminated. The petitioner, therefore, would of necessity have to be acquitted. The Court of Appeals avoided the issues raised.

The country and the courts need the guidance of the United States Supreme Court in the establishment of a rule that a communicated statement by a co-conspirator that the conspiracy has terminated because the government confiscated the object of the crime and thereby totally defeated the object, is just as binding as a statement made in furtherance of a conspiracy.

III.

IN LIGHT OF THE COURT'S LACK OF CONFIDENCE IN THE PROBATIVE VALUE OF FLIGHT EVIDENCE AS EXPRESSED IN *WONG SUN V. UNITED STATES,* 371 U.S. 471 (1963) THE COURT SHOULD CLEARLY SET FORTH GUIDELINES CONCERNING THE ADMISSION OF FLIGHT AND THE MANNER IN WHICH IT SHOULD BE CHARGED TO JURIES THEREBY BRINGING ALL THE CIRCUITS INTO HARMONY.

The petitioner objected to admission of testimony and documents as to flight as evidence of consciousness of guilt. In spite of petitioner's objection the court allowed the evidence.

The petitioner initially alerted the court to the problem before the openings of counsel, and continued his objection throughout the trial.

The evidence of flight was as follows:

A sealed indictment was returned against the petitioner on March 20, 1980. A bench warrant was issued on the same day. The petitioner was not located. On March 28, 1980 petitioner applied for and received a Florida driver's license in the name of Antonio Brafa. The petitioner was arrested in Florida.

Since the evidence was admitted, we felt in order for a jury to make a proper evaluation of this testimony a request to charge embodied within DeVitt and Blackmar, *Federal Jury Practice and Instructions,* 3d Ed. 1977 must also be given. The court agreed to give the balanced charge. However, the court omitted it.

The jury was left without any guidance as to the purposes of admission of the testimony. The jury was left free to give it

great weight without any ameliorating thoughts or considerations. Likewise, the jury was left free to believe that petitioner might have had some burden or duty to explain flight. Having allowed flight testimony over petitioner's objection and having been supplied with a specific written request to charge, the court committed error in not charging as requested. This Court should note the following:

1. The flight evidence was a substantial part of the government's case;

2. The petitioner vigorously objected to the introduction of the evidence and asked the court to prevent the government from opening to the jury on that evidence;

3. The petitioner's presence was limited to only one appearance;

4. The request was made both orally and written.

More importantly, the government has taken the position that a court need not charge flight even if requested. They cite *United States v. Coughlin,* 514 F. 2d 904, 906 (2d Cir. 1975) and *United States v. Robinson.* The Second Circuit accepted their position citing the same cases.

However, the Seventh and Fifth Circuits are not in agreement and closely adhere to the Supreme Court's view.

In *United States v. Jackson,* 572 F. 2d 636 (1978) the Seventh Circuit citing the United States Supreme Court said:

> "In *Wong Sun v. United States,* 371 U.S. 471, 483 n.10, 83 S. Ct. 407, 415, 9 L. Ed. 2d 441 (1963), the court remarked that

> 'we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. In Alberty v. United States, 162 U.S. 499, 511, 16 S. Ct. 864, 40 L. Ed. 1051, this court said . . . "it is not universally true that a man who is conscious that he has done a wrong will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper" since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witness. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth but the righteous are as bold as a lion".' "

The Court in *United States v. Jackson, supra,* continued that with the questionable probative value and highly prejudicial impact of flight, its admission should be regarded with caution. We would submit that after its admission a proper charge should be given to aid the jurors. In *Jackson* they sanctioned the charge we requested in this case.

The Fifth Circuit in *United States v. Adonizio,* 571 F. 2d 1384 (1978). The court was confronted with the introduction of questionable flight evidence. It allowed the verdict to stand on that point because the court carefully instructed the jury on flight. They stated:

> "Accordingly, the prejudicial effect, if any from the admission of this evidence was minimal."

Clearly the court gave its approval to a charge which allowed the jury to weigh and understand the evidence of flight.

It is submitted that a charge on flight is similar to a charge on an essential element of the crime. A defendant is certainly denied a fair trial when an essential element is not charged because the jury (being uneducated in the law) would be unguided as to what constitutes guilt. Here a jury is unguided as to the difficulties in assessing the motives for flight.

Because several different circuits treat the issue differently and since the Supreme Court has shown an interest in the issue the Court should set down clear guidelines.

IV.

THE SUPREME COURT SHOULD FORMULATE A UNIFORM TEST TO DETERMINE THE QUANTUM OF EVIDENCE NECESSARY EXCLUSIVE OF HEARSAY TO CONNECT A DEFENDANT WITH THE CONSPIRACY.

The reception in evidence of hearsay declarations by persons alleged to be co-conspirators of the defendant on trial is allowed by every circuit.

The hearsay must be:

1. Made during the course of the conspiracy;

2. In furtherance of the conspiracy; and

3. A determination that there is sufficient evidence exclusive of the hearsay to connect the defendant with the conspiracy.

The federal courts have not formulated a uniform test to make that determination.

The Supreme Court in *United States v. Nixon,* 418 U.S. 683, 701 (1974) stated:

> "Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and of the declarations at issue were in furtherance of that conspiracy."

At page 701 in note 14 the Court elaborated on its expression "independent evidence" and suggested that "as a preliminary matter there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury."

While the circuit courts have been firm in their requirement that the independence of the evidence be demonstrated they have been neither uniform nor clear in their application of the standard by which the sufficiency of the independent evidence is to be gauged.

The Second Circuit has determined that test of sufficiency be by a fair preponderance of the independent evidence.[2] While the Fifth Circuit calls for "a prima facie showing of the existence of a conspiracy and of the defendant's participation therein", the Fifth Circuit also demands that the independent evidence "be

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2. *United States v. Geaney,* 417 F. 2d 1116 (2nd Cir. 1969).

sufficient to support a finding by the jury that the defendant was himself a conspirator."[3]

Each of the other circuits appear to have a standard of proof somewhere in between the Second and Fifth Circuits.

The Court should put to rest any ambiguity in the standards bringing all the circuits in conformity.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

MICHAEL A. QUERQUES

MICHAEL A. QUERQUES, P.A.
Attorney for Petitioner

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3. *United States v. Olina*, 497 F. 2d 130 (5th Cir. 1974).

APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 10, 1984

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

83-1411

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of April, one thousand nine hundred and eighty-four.

Present:

HONORABLE J. EDWARD LUMBARD,
HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

FORTUNATO INZONE,

Defendant-Appellant.

The summary order filed March 27, 1984, is amended by inserting on page 3, line 5, after "it." the following:

Opinion Filed April 10, 1984

It may have been preferable for the Court to instruct specifically on the concept of termination of a conspiracy. However, the trial judge adequately conveyed the essence of the defense contention by instructing the jury, "It is essential, however, that the conspiracy be in existence at the time a particular defendant, such as the defendant on trial here, is alleged to have joined the conspiracy." This sufficed, in the circumstances of this case, since the critical evidence concerning the defendant's participation in the conspiracy showed him in attendance at the September 8 meeting, which occurred after the point at which defense counsel contended the conspiracy was no longer in existence. The opposing contentions in the summation adequately focused the jury's attention on the claims concerning continued existence and termination of the conspiracy. *See United States v. Amaral*, 488 F.2d 1148, 1151 (9th Cir. 1973); *United States v. De Sisto*, 329 F.2d 929, 934 (2d Cir. 1964).

s/ J. Edward Lumbard

s/ Jon D. Newman

s/ George C. Pratt
Circuit Judges

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MARCH 27, 1984

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

83-1411

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of March, one thousand nine hundred and eighty-four.

Present:

HONORABLE J. EDWARD LUMBARD,
HONORABLE JON O. NEWMAN
HONORABLE GEORGE C. PRATT
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

FORTUNATO INZONE,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

Opinion Filed March 27, 1984

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

1. The evidence was sufficient to sustain the conviction. Two accomplices, Francesco Rolli and John Egitto, both employed at the Alitalia warehouse at John F. Kennedy International Airport, testified that appellant actively participated in the three-hour September 8, 1979, meeting at Salvatore Gallina's home. The purpose of this meeting was to determine the location of the heroin shipment and to plan how to retrieve it. The six conspirators present at the meeting, disbelieving Rolli's and Egitto's representation that DEA agents had seized the package containing over one million dollars worth of heroin from the Alitalia warehouse, individually interrogated Rolli and Egitto. Inzone's active participation at this meeting, coupled with evidence of telephone calls at critical times in the importation scheme between Inzone and other members of the conspiracy, permitted the jury to find that he was a member of the conspiracy.

Appellant contends that the Government may not rely on the September 8, meeting to establish his participation in the conspiracy since, he alleges, the conspiracy to import heroin terminated no later than August 3, 1979, when the DEA agents seized the heroin shipment. We disagree. Importation is a continuing crime that does not terminate the moment contraband enters a jurisdiction but continues until it reaches its importers. *See United States v. Barnard*, 490 F.2d 907, 911 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); *United States v. Jackson*, 482 F.2d 1167, 1178 (10th Cir. 1973). Seizure of contraband does not necessarily terminate an importation conspiracy. Where, as here, most of the conspirators refused to believe that the contraband had been seized, and actively persisted in their efforts to retrieve

the contraband and thereby complete the importation, the conspiracy could be found to have continued at least until the September 8, 1979, meeting. *See, e.g., United States v. Varella*, 692 F.2d 1352, 1362 (11th Cir. 1982), *cert. denied sub. nom. Gavin v. United States*, 103 S. Ct. 3542 (1983).

In addition, the Government introduced evidence of Inzone's flight and assumption of a false identity immediately following the issuance of a warrant for his arrest.

2. Appellant's challenges to the jury instructions are without merit. Inzone first asserts that the District Court erred in failing to charge the jury as to the termination of the conspiracy. While the District Court declined to incorporate the language of appellant's requested instruction, the Court's charge properly presented appellant's defense that the conspiracy had terminated prior to the events linking him to it. Second, contrary to appellant's contention, the District Court properly instructed the jury that the defendant could not be convicted simply because he knew of illegal acts or was present when others discussed such acts. *Cf. United States v. Provenzano*, 617 F.2d 37, 45-46 (2d Cir. 1980). Third, appellant alleges that the District Court failed to instruct the jury as to the significance of evidence of Inzone's flight. Prior to the jury instructions, Judge Neaher agreed to give a standard balanced charge as to flight. Accordingly, both sides argued the issue to the jury. The Government specifically conceded in its rebuttal summation that flight may be prompted by motives not inconsistent with innocence. Inadvertently, the District Judge omitted the flight instruction from his charge. This omission is not grounds for reversal. *See, e.g., United States v. Coughlin*, 514 F.2d 904, 906 (2d Cir. 1975); *United States v. Robinson*, 475 F.2d 356, 384 (D.C. Cir. 1973). Moreover, since appellant failed

to object at trial, the point was waived. *United States v. Clemente*, 640 F.2d 1069, 1081 (2d Cir. 1981).

3. Inzone also alleges that the trial court improperly admitted statements by co-conspirators Emanual Adamita and Paul Zinerco pursuant to Fed. R. Evid. 801(d)(2)(E). Rolli was permitted to testify that Adamita inquired of him whether Egitto was to be trusted, explaining that if Egitto had stolen the heroin he would be killed, and that subsequent to the September 8, 1979, meeting, Zinerco recounted a beating received at the hands of several unnamed co-conspirators. Inzone maintains that these statements were not made in furtherance of the conspiracy as they post-date the seizure of the heroin shipments, on which date appellant alleges the conspiracy terminated. The District Court was entitled to conclude that the conspiracy was in effect when these remarks were made and that the statements were uttered in furtherance of the importation conspiracy. Throughout September, 1979, members of the conspiracy actively pursued attempts to retrieve the missing heroin. Suspecting that the heroin might have been stolen by one of the conspirators and hoping to extract an admission from the guilty member, various members of the conspiracy interrogated and pressured other members of the scheme. The challenged statements were in furtherance of the conspiracy since they were part of the effort to retrieve the missing heroin shipment. Adamita's question to Rolli attempted to assess the possibility that Egitto had stolen the heroin, and the threat to kill Egitto, if he had stolen the heroin, conveyed the conspirator's commitment to retrieve the package at all costs. Similarly Zinerco's account of the beating was a caution to Rolli of the dangers of disloyalty, part of a continuing effort to ascertain whether Rolli or Egitto had retained the shipment. In any event, since Zinerco testified, appellant was not deprived of an opportunity for cross-examination.

Opinion Filed March 27, 1984

4. Appellant's remaining contentions are without merit.

s/ J. Edward Lumbard

s/ Jon O. Newman

s/ George C. Pratt
Circuit Judges

EXCERPTS FROM TRIAL BRIEF

ADDENDUM

POINT II

THE GOVERNMENT'S OWN CASE ESTABLISHED THE TERMINATION OF THE CONSPIRACY NOT LATER THAN AUGUST 31, 1979 WHEN THE GOVERNMENT REMOVED THEIR DECOY BOX AS DEFENDANT ROLLI WATCHED.

A.

Generally When A Conspiracy Terminates

People who enter into a conspiracy do not bind themselves together as conspirators, each responsible for the acts of the others, forever, but only for the duration of the conspiracy.

A conspiracy may terminate in one of the following ways. It may terminate by reason of its own terms. It may terminate naturally upon completion of its object or its defeat, or voluntarily by abandonment, or by affirmative acts of withdrawal. It may terminate also by arrest or death. *Fiswich v. U.S.*, 329 U.S. 211, 217 (1946); *Sandez v. U.S.*, 239 F.2d 239 (9 Cir. 1956); *U.S. v. Chase*, 372 F.2d 453 (4th Cir. 1967); and *People v. Leach*, 541 P.2d 296, 303 (Sup. Ct. Calif. 1979).

It has also been stated in the Model Penal Code, Sec. 503(7)(a) that

> "conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired."

Excerpts From Trial Brief

See also *Marcus, Prosecution and Defense of Criminal Conspiracy Cases,* Sec. 4.04(1)

B.

The Conspiracy Ended With Each Importation Because The Agreement Required A Renewal By An Okay That Everything At Alitalia Was Calm And Cool. The Conspiracy Was By Its Own Terms Self-destructing After Each Shipment.

The conspiracy was one which existed or was agreed to on a shipment by shipment basis. Therefore, with the importation of each shipment there had to be a renewal of the agreement. Rolli established this clearly as the agreement by his testimony. Thus, by "direct evidence in the form of testimony concerning the terms of the agreement", the government's own case proved termination of the conspiracy not later than August 31, 1979.

After the first shipment was so small Rolli and Zinerco were angry about it and had a discussion about which Rolli expounded at p. 281:

> "We left it that *if they wanted to do again this shipment,* the next shipment he (Zinerco) was going to tell Nino (Silvestrini) . . . to tell whoever to put some load into it."

At another point in his testimony Rolli again established that the conspiracy was to end with each shipment being imported and there had to be a renewal of the agreement before another shipment was sent to New York. Rolli learned of the second shipment from Zinerco between Tuesday, August 21 and Thursday, August 23 (p. 286) when Zinerco called and gave him an airway bill number Rolli testified at p. 285:

Excerpts From Trial Brief

> "*I protested because we had agreed on having an O.K.*, Nino, Paul and I, at the meeting on Knickerbacker Avenue, *they would have to wait for O.K. to see if everything was calm and cool at Alitalia.*"

C.

What Was The Status Of The Alleged Conspiracy When Inzone Appeared On The Single Occasion On September 8, 1979? The Conspiracy Was (1) Self-Destructed By Its Own Terms (2) Defeated By Government Actions (3) Abandoned By The Co-conspirators.

The agreement as explained by Rolli was that the conspiracy was on a shipment by shipment basis, i.e. would end or have to be renewed after each shipment based on an O.K. that everything at Alitalia was calm and cool, therefore on September 8, when Inzone appeared, the conspiracy to import was over.

Inzone's knowledge, if any, per force would be that the jig was up because the government knew they thwarted and defeated the conspiracy.

LET US EXAMINE THE GOVERNMENT'S KNOWLEDGE, INTENT AND ACTIONS:

1. The government confiscated the package on August 29 to thwart and defeat any importation.

2. The government replaced the package on August 29 with a dummy box intending to arrest the perpetrators.

3. The government waited for the conspirators to take the package until August 31 and learned the conspirators were wise to what the government had done.

Excerpts From Trial Brief

4. The government, realizing the conspirators were wise to the dummy box, removed the box.

Inzone's knowledge, if any, per force, would also be that the jig was up because the defendants knew their conspiracy was self-destructed, destroyed by their own actions and destroyed by the government's actions.

LET UP EXAMINE THE CO-CONSPIRATORS' KNOWLEDGE, INTENT AND ACTIONS (294-295):

1. Rolli knew the box was confiscated by the government because

1) of its location on the edge of the bin

2) the airway bill was facing out

3) the sticker "Handle With Care" was sticking out

4) by mutual agreement, a single package did not belong in a high bin

5) he found out that a government agent was there the morning of August 29.

2. Rolli told Egitto August 29 (297) after he spoke to Zinerco (298)

1) stay away from the package

2) suspicious someone is watching

3) the package is hot.

Excerpts From Trial Brief

3. Rolli on August 31, 1979 actually saw the agent take the dummy package away (298) by having an employee use a fork lift to lower the whole bin.

4. Rolli testified at page 299:

> "*I felt relieved because I knew that officially the package had been seized and these people would have to put it down as a loss.*"

5. Rolli called Zinerco and told him exactly what he saw. (299)

Therefore, as of August 31, 1979 certainly the conspiracy which was to be shipment by shipment and terminating with each shipment until an O.K. was given that everything at Alitalia was calm and cool was terminated.

It was clear that the government knew the conspirators were wise to them because they did not go for the dummy package. It was also uncontradictable that the defendants Rolli, Egitto and Zinerco knew the conspiracy was over. In fact, Rolli when told by Zinerco others "were pressuring him to find out what happened to the package", Zinerco also said: (1) a lot of problems with these people; (2) people upset because I went away for weekend; (3) people wanted to talk to me and Egitto. Rolli testified he said to Zinerco:

> "*This was crazy* because if nothing in newspapers maybe the agent, they were just making a surveillance." (301-302)

In brief one might describe what happened thusly:

Excerpts From Trial Brief

The government confiscated the real package and in replacing it was saying — we have defeated your conspiracy to import — and when you come and take the box we will arrest you.

The conspirators responded by saying — you may have defeated and terminated our conspiracy to import — and we know it — but we are not so dumb as to not realize it is all over. You may have defeated our conspiracy — but if you haven't we are doing it ourselves because we are not doing anything else — you can shove the box — you are not going to arrest us because we are wise to you.

In this posture the government was (1) wise to the conspiracy, (2) defeated the conspiracy, (3) the conspirators had a conspiracy that was limited to a shipment by shipment arrangement which required an O.K. that everything at Alitalia was calm and cool, and (4) the conspirators abandoned efforts to remove the box knowing they would be arrested. The conspiracy terminated not only by force of the government's knowledge and actions, and the defendants' knowledge and actions, but also because of the very terms of the agreement of the conspiracy as well as the abandonment of the agreement because of what happened.

Furthermore, between August 31, 1979 and September 7, 1979 as between the conspirators there no longer was any agreement or concerted purpose because there was extreme dissension and distrust.

Excerpts From Trial Brief

D.

Inzone's Status Was Not As A Co-Conspirator To Import By Appearing On September 8, 1979 For The First and Only Time As To A Conspiracy That Had:

1. Self-Destructed By Its Own Terms
2. Been Thwarted And Defeated By Government Action
3. Been Abandoned

The defendant Inzone is charged with conspiracy to *import* drugs between August 1, 1979 and September 30, 1979 when he came on the scene for the one and only time on September 8, 1979. If a defendant charged with conspiracy is by law responsible for what his alleged co-conspirators say and do he should likewise be chargeable with what his alleged co-conspirators actually said and did when they realized and knew the government was on to them and had defeated the conspiracy by confiscating the package and replaced it with a dummy package. That is that his alleged co-conspirators:

1. would not go to the box because the government was wise

2. would not go to the box because it was hot

3. would write it off as a lost box

4. would know things were not cool and calm at Alitalia

5. would no longer be able to O.K. a shipment

6. therefore conspiracy terminated by its own terms, by government defeating it, and abandoning it.

Therefore, with the knowledge above imputable to Inzone of what transpired between August 29 and August 31, 1979, there

was no evidence to show he was in the picture so there is no way he could be involved in a conspiracy to import. Upon his single appearance on September 8, 1979 or ten full days after the termination of the conspiracy to import, there is no evidence to link him to any importation. The conspiracy to import is dead for ten days when he arrives on the scene. This arrival is not to participate in any importation. His arrival was for the reasons expressed elsewhere herein.

Inzone on September 8, 1979 must be viewed as one who would take the conspiracy as he then 1) knew it, 2) understood it, and 3) embraced it. Inzone could not possibly have by his single appearance on September 8, 1979 have joined any conspiracy to import drugs on August 13, 1979 which was successful or on August 29, 1979 which was defeated by government actions for all of the following reasons:

1. The conspiracy had self-destructed already.

2. The conspiracy had been defeated by government action.

3. By the operative conspirators, i.e. those who made it work, the conspiracy had been abandoned.

4. The questions showed a distrust and no meeting of the minds and no agreement.

5. The questions showed things at Alitalia were exactly the opposite of calm and cool and there could be no more shipments, therefore no longer even a dream to import via the former conspiracy.

6. The three men, Rolli, Egitto and Zinerco, would no longer go along with anything about further shipments. In fact no one even suggested this at Alitalia or any place else.

Excerpts From Trial Brief

7. Inzone's questions were only repetitive of LoBue and Toto, the bearded man who actually took charge.

8. Inzone never spoke English except to tell Egitto the highway was two blocks away.

Therefore, there was no existing conspiracy to import drugs on September 8, 1979 for Inzone to join.

E.

Inzone's Appearance On September 8, 1979 Was Not Connected To Any Importation Conspiracy.

It is clear from the above analysis that the importation conspiracy was destructed, defeated and abandoned by the latest August 31, 1979.

When Inzone entered on September 8, 1979 he could not enter any conspiracy to import. Inzone entered because it was believed that the drugs were stolen by the Alitalia group, i.e. Zinerco, Rolli and Egitto.

Inzone was not involved in the beating of Zinerco after September 8.

Inzone was not involved in the ultimatum which came after September 8 through other persons, to wit: (1) give us the drugs you stole, or (2) pay $800,000 for the drugs you stole. Even if he were involved in a conspiracy to receive or recoup the drugs stolen or thought to be stolen or the value of such drugs, this would not be a conspiracy to import because the importation would have been complete. Any conspiracy would be to gain possession

after the importation by Rolli, Egitto and Zinerco who imported and stole the package or to obtain its value.

Certain questions can make the issue clear and its answer obvious so we ask:

Query #1 — Since there are no proofs of anything involving Inzone before or after September 8, 1979 what was the agreement on September 8, 1979 between

Rolli)
Egitto) and Inzone? It could not
Zinerco)

be to import drugs as charged!!

Query #2 — Since there are no proofs of anything involving Inzone before or after September 8, 1979, what was the agreement on September 8, 1979 between

LoBue)
Toto)
Silvestrini) and Inzone? It could not
Gallina)
Vallelunga)

be to import drugs as charged!!

REQUEST TO CHARGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Criminal Docket Nos.

80 Cr. 131 (S-4)
80 Cr. 234

UNITED STATES OF AMERICA,

vs.

FORTUNATO INZONE,

Defendant.

It is respectfully requested that the Court charge as follows in behalf of the defendant, Fortunato Inzone:

AS TO CONSPIRACY

1. In order to establish a case against this defendant on the conspiracy indictment the government has the burden of establishing all the essential elements of the crime of conspiracy. Before you may find defendant guilty of the crime of conspiracy you must find the proof sufficient, as to each element, to convince you beyond a resonable doubt.

Stated differently, to find defendant guilty you must find as to that defendant that the government has satisfied you beyond a reasonable doubt as to all of the following elements which I will explain in more detail later on. The government must prove:

Request to Charge

(1) That during the period charged in the indictment to wit: August 1, 1979 to September 30, 1979 there was an agreement between the defendant, Fortunato Inzone and other persons to accomplish the objectives set forth in the indictment;

(2) That the defendant had clear knowledge of the existence of the conspiracy or agreement and its objectives;

(3) That with that clear knowledge the defendant joined the conspiracy and participated therein with a view to making it succeed he "must in some sense promote their venture himself, make it his own." *U.S. v. Freeman,* 498 F.2d 569, 573-574 (2d Cir. 1974)

(4) That the defendant had a specific criminal intent in joining and participating in the alleged conspiracy with a view to accomplishing the objectives of the conspiracy

In order to prove *element number one* that a conspiracy actually existed the government must prove beyond a reasonable doubt that there was a mutual agreement or combination of two or more persons by concerted action to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. Thus a conspiracy is a kind of "partnership in criminal purposes" or a meeting of the minds in which each partner or each member becomes the agent of every other member. The gist of the offense is a combination or agreement; a meeting of minds to violate the law by a concert of action of all the parties working together, understandingly with a single design for the common purpose of accomplishing the objectives charges. *U.S. v. Melchor Lopez,* 627 F.2d 886 (9th Cir. 1980).

Request to Charge

Mere similarity of conduct among various persons and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of the conspiracy.

However, the evidence need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be achieved. What the evidence must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

It is not necessary for the prosecution to prove that all the means or methods set forth in the indictment were agreed upon to carry out the conspiracy, or that all such means or methods were actually used or put into operation. But it is necessary that the evidence establish to the satisfaction of the jury that one or more of the means or methods described in the indictment was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the indictment.

In order to prove *element number two* that defendant had knowledge of the conspiracy the government must prove beyond a reasonable doubt that the defendant under consideration actually knew of the conspiracy and its objectives. The defendant must know enough of the details of the conspiracy to make him aware of its objectives.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand,

Request to Charge

a person who has no knowledge of a conspiracy, but happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a conspirator. This is so, because *without knowledge a specific criminal intent cannot exist.* Unless you are satisfied beyond a reasonable doubt that an accused had both specific criminal intent and knowledge you must acquit. Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself. *Ingram v. U.S.*, 3 L.Ed.2d 1503, 1508.

Furthermore, to establish intent, the government has the burden of producing evidence which is clear and not equivocal. This is so, because charges of conspiracy are not to be made out by piling inference upon inference and a conviction cannot rest on suspicion, regardless of how great the suspicion might be. *Direct Sales Co. v. U.S.* 319 U.S. 703, 63 S. Ct. 1265; *Ingram v. U.S.*, 360 U.S. 672, 3 L.Ed.2d 1503, 79 S.Ct. 1314; *U.S. v. Nardiello*, 303 F.2d 876 (3d 1962).

The government must prove beyond a reasonable doubt as the *third element* that the defendant under consideration did knowingly and willfully participate in the unlawful plan with the intent to advance or further the object of the conspiracy.

To participate knowingly and willfully means to participate voluntarily and understandingly and with specific intent to do some act the law forbids, that is to say, to participate with bad purpose either to disobey or to disregard the law. So if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and willful participant—a conspirator.

Request to Charge

Neither association with conspirators nor knowledge that something illegal is going on by themselves constitute proofs of participation. Even approval or acquiescence in the object of the conspiracy is not sufficient to prove participation. *U.S. v. Webb,* 359 F.2d 558, 562, citing *U.S. v. Potash,* 118 F.2d 54 and *U.S. v. Falcone,* 311 U.S. 205; *U.S. v. Melchor-Lopez,* 627 F.2d 886 (9th Cir. 1980).

As to the *fourth and last element* of conspiracy the government must prove beyond reasonable doubt as to the defendant being considered that the defendant through his own actions, deeds, conduct, and words demonstrated a concert of purpose, that in some sense he promoted the venture himself, that he made it his own so that he could help to accomplish its objectives. *U.S. v. Falcone,* 311 U.S. 205; *U.S. v. DiRe,* 159 F.2d 818 (2 Cir. 1967), aff'd. 332 U.S. 581; *U.S. v. Peoni,* 100 F.2d 401 (2d Cir. 1939); *U.S. v. Freeman,* 498 F.2d 569, 573-574 (2nd Cir. 1974).

2. In determining whether or not a defendant, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, in a conspiracy must be established by evidence as to his own acts and conduct, what he himself said or did. See *U.S. v. Falcone, U.S. v. DiRe, U.S. v. Peono,* all supra and 27 F.R.D. 39 *Jury Instructions* Number 13.05 at page 125 and *U.S. v. Stromberg,* 268 F.2d 256, 265. (2d Cir. 1959); *U.S. v. Hopkins,* 518 F.2d 152 (3rd Cir. 1975).

3. The mere fact that a defendant may be present at meetings or associated with members of the conspiracy is not in itself enough to make him a conspirator unless you first find that he intentionally joined the conspiracy with knowledge of its purpose. Guilt may

not be inferred from mere association and inferences of participation are not to be drawn from mere meetings.

United States v. Bentvena, 319 F.2d 916, 939 (2 Cir. 1963); *United States v. Bufalino,* 285 F.2d 408 (2d Cir. 1960), *Glover v. United States,* 306 F.2d 495 (10 Cir. 1962); *United States v. Stromberg,* 268 F.2d 256, 267 (2 Cir. 1969) *cert. den.* 361 U.S. 863. *United States v. DiRe,* 332, U.S. 531 (1948), *Causey v. U.S.* 352 F.2d 203.

4. Wilfulness and criminal intent are essential elements of the crime of conspiracy. Extrinsic evidence, i.e. the acts and declarations of a defendant may be considered by you in determining whether those elements of criminal intent did in fact exist. However, where those acts and declarations could just as easily have been done in furtherance of legitimate purposes, or without wilfulness and criminal intent they are insufficient as a matter of law to permit you to find criminal intent. *United States v. Crosby,* 294 F.2d 928 (2 Cir. 1961); *United States v. Bufalino,* supra, *United States v. Reina,* supra, *United States v. Flynn,* 216 F.2d 354 (2 Cir. 1954); *Duke v. United States,* 233 F.2d 893 (5 Cir 1956).

5. If you should find that a defendant, knowing of the existence of the conspiracy, took no action to prevent its continuance and took no steps to reveal its existence, and failed to protest to those responsible, he would not be guilty of the offense of conspiracy. In other words, a defendant has no duty as a matter of law to do any of these things, and his mere inaction is not an offense against the laws of the United States. In order to find a defendant guilty of the offense of conspiracy, you must find beyond a reasonable doubt that there was informed and

interested cooperation, stimulation or instigation. If you do not so find, you must acquit such defendant.

Direct Sales Co. v. United States, 319 U.S. 703 (1943), *United States v. DiRe,* supra, *United States v. Dellaro,* 99 F.2d 781 (2 Cir. 1938); *Rossi v. United States,* 49 F.2d 1 (9 Cir. 1931).

6. Mere knowledge of or acquiescence in the object or the purpose of the conspiracy, without an intention and agreement to cooperate in the crime is insufficient to constitute one a conspirator.

Cleaver v. United States, 238 F.2d 766, 771 (10 Cir. 1956), *Thomas v. United States,* 57 F.2d 1039, 1042 (10 Cir. 1932).

7. The fact that persons have entered into a conspiracy does not bind them together as conspirators, each responsible for the acts of the others, forever, but only for the duration of the conspiracy, A conspiracy may terminate in one or more of the following ways. It may terminate by reason of its own terms. It may terminate naturally upon completion of its unlawful design or its defeat (People v. Leach, 541 F.2d 296, 303). It may terminate voluntarily by abandonment of the scheme or or purpose by all of the conspirators. It may terminate as to any conspirator or conspirators by affirmative acts of withdrawal. Or the conspiracy may terminate involuntarily as a result of some outside force such as its defeat by government action, by arrest or death. *United States v. Labate,* 168 F.Supp. 531; *U.S. v. Chase,* 372 F.2d 453 (4th Cir. 1967); *Fiswick v. U.S.* 329 U.S. 211, 217 (1946); *Sondez v. U.S.* 239 F.2d 239 (9 Cir. 1956).

s/Michael A. Querques
Attorney for Defendant
Frank Inzone

REQUEST TO CHARGE (ON FLIGHT)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Indictment #80-00131-04(S)

UNITED STATES OF AMERICA

-vs-

FORTUNATO INZONE,

Defendant.

It is respectfully requested that the Court charge as follows:

The intentional flight of a defendant immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not of course sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining whether the case has been proven beyond a reasonable doubt. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

In your consideration of the evidence of flight you should consider that there may be reasons for this which are fully consistent with innocence. These may include fear of being apprehended, unwillingness to confront the police, or reluctance to appear as a witness. Let me suggest also that a feeling of guilt does not necessarily reflect actual guilt.

Request to Charge (On Flight)

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

MICHAEL A. QUERQUES, P.A.

By Michael A. Querques
Attorney for Fortunato Inzone

POST TRIAL BRIEF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

80-00-131 (S-4)

UNITED STATES OF AMERICA,

vs.

FORTUNATO INZONE,

Defendant.

MICHAEL A. QUERQUES, P.A.
Attorney for Defendant
433 Central Avenue
Orange, New Jersey 07050
(201) 673-1400

LOUIS C. ESPOSITO
On the Brief

STATEMENT OF FACTS

The instant indictment charged the defendant, Fortunato Inzone, along with nine co-defendants with the following crimes:

1) In Count 1 with a conspiracy to import heroin into the United States during a period between August 1, 1979 and September 30, 1979;

2) In Count 2 with the importation of heroin on August 13, 1979 on which the jury found defendant not guilty;

3) In Count 3 with the importation of 6 kilograms of heroin on August 28, 1979.

The key government witness in the case was Frank Rolli. The theory of the government's case flows from the testimony of Rolli. Since the crucial testimony is alike and since Rolli covers the entire period of the alleged conspiracy Rolli's testimony will be used to outline the government's case.

Rolli, a cargo worker for Alitalia Airlines told the story of his involvement as follows.

Rolli was contacted the end of June or July 1979 by Paul Zinerco a former employee of Alitalia (67). Zinerco proposed a plan involving the importing and bringing through customs of certain "stuff" for which Rolli and Zinerco would receive $7,000.00 per pound (58). This conversation took place in Mr. Zinerco's bakery and continued across the street to a cafe on Knickerbocker Avenue in Brooklyn, New York (59).

At the cafe Rolli and Zinerco were joined by Nino Silvestrini. Silvestrini discussed the mechanics of the importation and the by-pass of customs with Rolli as well as the potential for getting a better price per pound. Silvestrini agreed to find out about the money and using a city other than Palermo from which to send the stuff (62). When Silvestrini left, Zinerco and Rolli continued discussing ways and means of getting the package in successfully (64).

Between August 8th and 10th, 1979 Zinerco called Rolli and told him that a package was coming into the country on the weekend and gave him the airway bill number (65-66). The package arrived at a time when Rolli anticipated being off so he enlisted

the aid of John Egitto (67). The package arrived on August 13, 1979. The package was removed from Alitalia and through customs by the combined efforts of Rolli, Egitto and Silvestrini with Rolli actually sneaking it past customs and delivering it to Silvestrini (67-69).

After the package cleared customs and was delivered to Silvestrini, Zinerco received only $7,000.00 from Silvestrini to show good faith because the package was only a test package and contained only an ounce or two of the stuff (70-71). Zinerco and Rolli split the money in half but set aside some money (a few hundred dollars) for Egitto (71).

After some excitement over the fact that the box had such a small amount Zinerco and Rolli "agreed to do it once more with the understanding these people would make a substantial shipment at this time." (71)

About August 27 a box was sent from Sicily via Alitalia to the same name and address, i.e. Maria Canale, 1571 DeKalb Avenue, Brooklyn. Zinerco called Rolli and told him to expect another package in a few days. Rolli alerted his co-worker Egitto because, again, the package was to arrive on Rolli's day off (73-74).

The package arrived in the United States on August 28, 1979. The package had been checked in and assigned to Bin A-132. This Bin was a lower level bin where incoming packages were stored at Alitalia. Egitto, at Rolli's request, moved the package to Bin C-147 which is in the top row of Bins to avoid detection by specially trained dogs that are used to "smell out" drugs. The same procedure was used in the shipment of the first package. The second package was seized by the government on August 29, 1979 and replaced with a decoy package (74-75).

Post Trial Brief

On August 29, 1979 about 4:30 p.m. Rolli went to the warehouse and notice the package in a suspicious position because it was too visible and Zinerco who had also been there earlier saw D.E.A. Agent Gartland on the premises. Zinerco instructed Rolli to offer Egitto $10,000 to get the box out. Instead Rolli told Egitto to stay away from the box because it was hot (76-78).

On August 31, 1979 Rolli was returning to work saw Agent Gartland in the manager's office and a half hour later with the help of a forklift operator, he saw Agent Gartland take the package down from the Bin and remove it from the warehouse (78). Rolli advised Zinerco the government took the package and told him "to put his heart in peace." Rolli then left for the Labor Day weekend and returned September 6, 1979 (78-79).

Upon his return from the weekend Rolli was advised by Zinerco that everything was in bad shape, the people got upset because Rolli left, and there was so much distress they wanted a meeting and Rolli was to produce Egitto (79). Then began a series of meetings between the Alitalia trio of Zinerco, Rolli, Egitto and others.

FIRST MEETING-GAS STATION

The first meeting was held at a gas station on the Belt Parkway on September 7, 1979. It involved Rolli, Zinerco, Silvestrini, Don Luigi LoBue, Toto (Salvatore Calabria) and Giuseppe Vallelunga (79-80).

The meeting was conducted by Don Luigi LoBue who questioned Zinerco, Silvestrini and Rolli concerning the whereabouts of the package and indicating a distrust of the seizure story. Don Luigi wanted proof the package was indeed seized

by United States Customs. He insisted the newspapers would have covered the story if there was a seizure by the government. Toto in turn made Zinerco and Rolli understand they could not be tricked and if they had the package they "better surrender it" (80-84).

SECOND MEETING—GALLINA'S HOUSE

The second meeting occurred the next day, Saturday, September 8, 1979. The meeting was held at a private home in Queens, New York owned by Salvatore Gallina. Present at that meeting were Rolli, Zinerco, Egitto, Silvestrini, LoBue, Sal Gallina, Giuseppe Vallelunga, Toto and allegedly Fortunato Inzone. The discussion again centered around the package confiscated by the government on August 29, 1979 or ten days earlier. The meeting was conducted by Don Luigi LoBue and Toto. The others present also allegedly asked questions concerning the lost package but Toto and LoBue dominated and controlled the questioning (93-103).

By September 8, 1979 it can be said that there were two different and conflicting groups. By September 8, 1979 the two groups were comprised of the following people:

THE ALITALIA GROUP	THE OTHERS
1. Zinerco	1. Don Luigi LoBue
2. Rolli	2. Guiseppe Vallelunga
3. Egitto (not present 9/7)	3. Sal Gallina (not present 9/7)
	4. Silvestrini
	5. Toto
	6. Fortunato Inzone (not present 9/7)

Post Trial Brief

At both meetings the questioning and control rested in Toto and Luigi. Luigi said "Pretty sure somebody was trying to play a trick on them" (98). Certain questions were asked. Those questions concerned the appearance of the package, whether it had holes or was torn, the weight or other details. In response to the

> Q You said, they were asking you questions, who do you mean by they?
>
> A At that point there was *about six* people in that room and I would say at least each one of them asked us the same questions over and over again at least three or four times.

The meeting at Gallina's home ended with Don Luigi telling Rolli and Egitto "I think we better stop this meeting and we had a chicken and we let him go but we will take care of it" — "Don't worry about anything beause when we retrieve the package you will still get your money because you have been good boys" (103). Don Luigi also said "Don't worry about it, go home and keep your eyes open and see if you can find out anything to let us know" (93). It should be noted at this meeting Rolli was somewhat unsure about the identity of Fortunato Inzone. He just testified that the man he later says is Fortunato was called Al or Sal. He then said that his name is Fortunato (93).

MEETING — ROLLI AND ZINERCO AT ZINERCO HOUSE ON SEPTEMBER 11 or 13, 1979

Several days after the meeting at Gallina's, Rolli was called to Zinerco's house. When he arrived Zinerco explained how "they" had beaten him up, taken his wallet, the keys to his car, put a

gun to his mouth, and put a cord around his neck and "they" kept asking him what he had done with the package (123-125).

THIRD MEETING — SANTA ROSALIA CLUB ON SEPTEMBER 17, 1979

The next contact Rolli had with Zinerco was when he received a call from Zinerco and was told that a certain party is going to try and aid them with their problem (127-128). They met Amanuele Adamita who brought them to the Cafe Valentino and the Santa Rosalia Club above the cafe (129). There they met Rosario Gambino and a man named Sale (130-131).

During the first meeting at the Santa Rosalia, Gambino and the man named Sal told Zinerco, Rolli and Egitto that they had no interest in the package and "they were just there to try to see if they could help us because we were in big trouble" (130). Rolli recounted for Adamita, Rosario Gambino and Sal (Inzerillo) what he knew of the package as did Zinerco and Egitto (132). Zinerco also explained that he had brought Customs documentation to establish the package was confiscated but "the people" didn't believe and he could have made up the paper. Adamita offered to help with 50 to $100,000 "in order to find out information" about the package "or retrieve the package" (133). Before leaving Rolli, Zinerco and Egitto agreed to keep their eyes and ears open and gather some sort of evidence as to what happened to the package (133-134). On the way down the stairs Adamita asked Zinerco and Rolli if Egitto could really be trusted (134). After Rolli said yes, Adamita said: "Well, if you don't, somebody is going to have to be eliminated in case he might be the one" (139-140). Rolli was asked to get the name and address of the Manager at Alitalia (144).

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FOURTH MEETING — SANTA ROSALIA CLUB ON SEPTEMBER 19 or 20, 1979

Rolli, armed with the requested documentation, went to the Santa Rosalia Club to show Adamita, Gambino and Sal. He found Emanuele with the two other men, Rolli explained how an employee of Alitalia, had become suspicious because both the second and the first package had the same name and address on the bill of lading. Since the first name and address proved to be a phony, he alerted his bosses and the package was seized (141-144).

FIFTH MEETING — SANTA ROSALIA CLUB

The final meeting on September 23 or 24, 1979 was between Rolli and Emanuele Adamita on the sidewalk by the Santa Rosalia Club. Rolli brought the name of the Manager of Alitalia as he was requested to and gave it to Adamita while Gambino and Sal were nearby (144-145).

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ARGUMENT

POINT I

THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE COURT'S REFUSAL TO INSTRUCT THE JURY AS REQUESTED IN THREE SUBSTANTIAL AREAS.

A.

The Court's Refusal To Charge As Requested That 1) Presence At Meetings; 2) Association With Members Of A Conspiracy; 3) Knowledge That Something Illegal Is Going On; 4) Approval or 5) Acquiescence In The Object Of The Conspiracy By Themselves Are Not Sufficient To Establish Guilt.

As to the defendant, Inzone the only testimony that put him in the case was that he made a single appearance on September 8, 1979 in the cellar of the Gallina house. On this solitary occasion Rolli and Egitto were questioned mainly by Luigi LoBue and Toto (Salvatore Calabria) who seemed to be in charge of the meeting. The questions were basically put by these two men in Sicilian and Rolli interpreted for Egitto. The questions were about the size, weight, condition, appearance of the box and who may have taken it. It was alleged that of the "about six people" "each one of them asked us the same questions over and over again at least three or four times."

The defense countered with the alternate theory that defendant was not in the cellar and that even if he was his presence on September 8, 1979 and even the parrotting or repeating of someone

else's questions relating to retrieving a package thought to be stolen was not sufficient to prove either participation in a conspiracy to import which terminated by the government's confiscation of the box on August 31, 1979 which was seen by Rolli on that day or importation of the same box seized by the government on August 31, 1979. Since the conspiracy terminated on August 31, 1979 his presence on September 8, 1979 and repeating the questions of others would be so consistent with conclusions of non-participation that the case was not proven beyond a reasonable doubt.

Because of this factual context the defense submitted requests to charge which included the following:

CHARGE #1 on page 4:

> Neither association with conspirators nor knowledge that something illegal is going on by themselves constitute proofs of participation. Even approval or acquiescence in the object of the conspiracy is not sufficient to prove participation. *U.S. v. Webb,* 359 F.2d 558, 452, citing *U.S. v. Potash*, 118 F.2d 54 and *U.S. v. Falcone*, 311 U.S. 205; *U.S. v. Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980).

CHARGE #3 on page 5:

> The mere fact that a defendant may be present at meetings or associated with members of the conspiracy is not in itself enough to make him a conspirator unless you first find that he intentionally joined the conspiracy with knowledge of its purpose. Guilt may not be inferred from mere association and inferences of participation are not to be drawn from mere meetings. *U.S. v. Bentvena*, 319 F.2d

916, 939 (2 Cir. 1963); *U.S. v. Bufalino,* 285 F.2d 408 (2d Cir. 1960); *Glover v. U.S.*, 306 F.2d 594 (10 Cir. 1962); *U.S. v. Stromberg*, 268 F.2d 256, 267 (2 Cir. 1969), *cert. den.* 361 U.S. 863; *U.S. v. DiRe*, 332 U.S. 531 (1948); *Causey v. U.S.*, 352 F.2d 203.

CHARGE #6 on page 6:

Mere knowledge of or acquiescence in the object or the purpose of the conspiracy, without an intention and agreement to cooperate in the crime is insufficient to constitute one a conspirator. *Cleaver v. U.S.*, 238 F.2d 766, 771 (10 Cir. 1956); *Thomas v. U.S.*, 57 F.2d 1039, 1042 (10 Cir. 1932).

CHARGE #5 on page 6:

If you should find that a defendant, knowing of the existence of the conspiracy, took no action to prevent its continuance and took no steps to reveal its existence, and failed to protest to those responsible, he would not be guilty of the offense of conspiracy. In other words, a defendant has no duty as a matter of law to do any of these things, and his mere inaction is not an offense against the laws of the United States. In order to find a defendant guilty of the offense of conspiracy, you must find beyond a reasonable doubt taht there was informed and interested cooperation, stimulation or instigation. If you do not so find, you mus acquit such defendant. *Direct Sales Co. v. U.S.*, 319 U.S. 703 (1943); *U.S. v. DiRe,* supra.; *U.S. v. Dellaro,* 99 F.2d 781 (2 Cir. 1938); *Rossi v. U.S.*, 49 F.2d 1 (9 Cir. 1931).

The Defendant was entitled to have the jury instructed:

". . .on any defense which provides a legal defense to the charge against him and which has some foundation in the evidence, 'even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility'." *U.S. v. Creamer,* 555 F.2d 613, 616 (7 Cir. 1977); citing *U.S. v. Hillsman,* 522 F.2d 1376, 1378 (7 Cir. 1969). See also *Tatum v. U.S.* 190 F.2d 612, 617 (Ct. Appeals D.C. 1950); *Stauss v. U.S.* 376 F.2d 416, 419 (5 Cir. 1967); *U.S. v. Young,* 464 F.2d 160 (5 Cir. 1972)

As authority for thes charges counsel cited among others the following cases which contain the principles quoted:

Cleaver v. U.S. 238 F.2d 766,771 (Cir. 1956):

"Mere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy, without an intention and agreement to cooperate in the crime is insufficient to constitute one a conspirator. *Thomas v. United States,* 10 Cir. 67 F.2d 1039."

U.S. v. Stromberg, 268 F.2d 256, 267 (2d Cir. 19):

"But mere association with conspirators is insufficient abasis for a finding of participation. *United States v. DiRe,* 332 U.S. 581, 68 S. Ct. 222, 92 L.Ed. 210; *Aikens v. United States,* 98 U.S. App. D.C. 66, 232 F.2d 66; *United States v. Moloney,* 7 Cir., 200 F.2d 344."

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"In United States v. Reina, 2 Cir., 242 F.2d, 302, certiorari denied *sub nom.* Moccio v. United States, 354 U.S. 913, 77 S. Ct. 1294, 1 L.Ed. 2d 1427 we held that participation in a single isolated transaction was an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy."

U.S. v. Bentvena, 319 F.2d 916 (2d Cir. 1963):

"To find this to be of significance would be tantamount to holding that the mere association of conspirators is sufficient basis for a finding of participation. This notion we have already explicitly rejected. United States v. Stromberg, supra, 268 F.2d at 267."

Causey v. U.S., 352 F.2d 203, 207 (8 Cir. 1965)

"Charges of conspiracy are not to be made out of piling inference upon inference. Guilt of conspiracy may not be inferred from mere association. It is true that the proof may be circumstantial or direct or both, but it must convince beyond a reasonable doubt that a conspiracy existed, that the defendant knew it, and with that knowledge intentionally did some act or thing to further or carry on that conspiracy."

U.S. v. Webb, 359 F.2d 558, 562 (6 Cir. 1966)

"Defendant Stokeley's unexplained presence during such a series of suspicious events might well

justify grave doubts about her role. But neither association with conspirators nor knowledge that something illegal is going on by themselves constitute proofs of participation in a conspiracy. Citing U.S. v. Falcone, 311 U.S. 205 and U.S. v. Batash, 118 F.2d 54 (2d Cir.)

Jones v. U.S., 365 F.2d 87, 89 (10 Cir. 1966)

"Mere knowledge, or approval, or acquiescence in the object and purpose of a conspiracy, without agreement to cooperation to accomplish such object or purpose is not enough to constitute one a party to a conspiracy."

U.S. v. Melchor-Lopez, 627 F.2d 886, 891 (9 Cir. 1980)

"On the other hand, *there can be no conviction for guilt by association, and it is clear that mere association with members of a conspiracy, the existence of an opportunity to join a conspiracy, or simple knowlege, approval of, or acquiescence in the object or purpose of the conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient to make one a conspirator. Miller v. United States,* 382 F.2d 583, 587 (9th Cir. 1967); United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974: United States v. Cloughessy, 572 F.2d 190, 191 (9th Cir. 1977); United States v. Richardson, 596 F.2d 157, 162 (6th Cir. 1979), United States v. Collins, 552 F.2d 243, 245 (8th

Cir.), cert. denied, 434 U.S. 870, 98 S. Ct. 214, 54 L.Ed.2d 149 (1977); United States v. Hassell, 547 F.2d 1048, 1053 (8th Cir.), cert. denied, 430 U.S. 919, 97 S. Ct. 1338, 51 L.Ed. 2d 599 (1977); United States v. Quintana, 508 F.2d 867, 881 (7th Cir. 1975). *While each of these circumstances may be a relevant factor to be considered in a given case where existence of an agreement is in issue, no mere suspicion or surmise is permitted to replace the essential analysis of the qualitative nature of the acts in question.* United States v. Taylor, 562 F.2d 1345, 1352 (2nd Cir.), cert. denied, 432 U.S. 909, 97 S. Ct. 2958, 53 L.Ed.2d 1083, 434 U.S. 853 98 S. Ct. 170, 54 L.Ed.2d 124 (1977). *The line between conspiracy and an unexercised opportunity to join a conspiracy may be difficult to draw, but it must be drawn where the existence of an agreement is absent."* (Emphasis added)

B.

The Court Refused To Charge As Requested As To Flight.

Over defendant's objection the Court allowed testimony as to flight and consciousness of guilt.

The government established that a sealed indictment was returned against the defendant in the instant case on March 20, 1980. Pursuant to a bench warrant issued the same day government officers went to defendant's home and place of business to arrest him without success. On March 28, 1980 defendant applied for and received a Florida driver's licence in the name of Antonio Brafa.

In order for the jury to make a proper evaluation of this testimony defendant submitted a request to charge copied from Devitt and Blackmar, *Federal Jury Practice and Instructions,* 3d Ed. 1977.

The Court in failing to charge on flight left the jury without any guidance on this crucial evidence. The jury was left free to give it great weight without any amelioriating thoughts or considerations. Likewise the jury was left free to believe that the defendant may have had some burden or duty to explain the flight. Having allowed flight testimony over defendant's objection and having been supplied with a specific written request to charge, the Court committed error in not charging as requested. See *Austin v. U.S.* 414 F.2d 1155 (Ct. of Appeals, D.C. 1969).

C.

The Court Refused To Charge As Requested As To Termination Of The Conspiracy During The Trial And After The Trial.

The following facts are crystal clear with respect to the termination issue:

1. The box arrived at the Alitalia cargo facility on August 28, 1979;

2. By reason of information supplied by Alitalia the D.E.A. Agents confiscated the box on August 29, 1979. On the same day they removed the heroin contents of the box (except for 1 oz.), replaced the heroin with another powder, placed a homing device in the box, and returned the box to the bin;

3. On August 29, 1979, Rolli was alerted to the government's actions and told Egitto to stay away from the box because it was "bot";

4. On August 31, 1979, Agent Gartland recognizing that the interested parties were not going to take the box because they caught on to the government's activities, removed the box in its entirety;

5. The confiscation of the decoy box was known by the conspirators Rolli, Egitto and Zinerco by not later than August 31, 1979;

6. The knowledge of the confiscation of the box was communicated to Zinerco and Silvestrini on August 31, 1979 and presumably the same date to whoever else was interested in the box;

7. Between September 1, 1979 and September 6, 1979 it was communicated to Zinerco that the confiscation story was not believed. Rather it was believed someone was "playing a trick" and had converted or stolen the box to their own use;

8. On September 7, 1979 the idea that the box was stolen by Egitto, Rolli and/or Zinerco was communicated directly by LoBue and Toto to Rolli and Zinerco at the gas station meeting;

9. On September 8, 1979 defendant Inzone allegedly made a single appearance at the Gallina house where questioning took place concerning the box;

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10. Meetings continued for the balance of September relating to the box and retrieving the box.

The defendant argued throughout the case that the conspiracy terminated no later than August 31, 1979 on the grounds that:

1. The government defeated the conspiracy by confiscating the box;

2. The confiscation of the box was absolutely known by Rolli, Egitto and Zinerco on August 31, 1979;

3. The conspiracy to import was communicated to Silvestrini and whoever he was working with on August 31, 1979;

4. There was a falling out of the conspirators because some believed they had been tricked and the package stolen by Rolli, Egitto and/or Zinerco;

At this posture two conclusions seem apparent. One is that the conspiracy was terminated because the government defeated the importation and this was known to the conspirators. The second is that the conspiracy was terminated because of the theft of the package by some of the conspirators. With either conclusion, the importation would be consummated. Consequently, the jury should have been instructed on termination. If the jury accepted the evidence as proving termination of the conspiracy to import, the jury would have a sound basis for finding Inzone not guilty of both the conspiracy and the importation on August 28, 1979 because his single appearance on September 8, 1979 could be easily attributed to a purpose or object having absolutely nothing to do with importation.

Post Trial Brief

Because of the importance of the issue of termination defense counsel supplied the court with a written Request to Charge in this form:

CHARGE #7 on pp. 6 & 7:

> The fact that persons have entered into a conspiracy does not bind them together as conspirators, each responsible for the acts of the others, forever, but only for the duration of the conspiracy. A conspiracy may terminate in one or more of the following ways. It may terminate by reason of its own terms. It may terminate naturally upon completion of its unlawful design or its defeat *(People v. Leach,* 541 P.2d 296, 303). It may terminate voluntarily by abandonment of the scheme or purpose by all of the conspirators. It may terminate as to any conspirator or conspirators by affirmative acts of withdrawal. Or the conspiracy may terminate involuntarily as a result of some outside force such as its defeat by government action, by arrest or death. *U.S. v. LaBate,* 168 F.Supp. 531; *U.S. v. Chase,* 372 F.2d 453 (4 Cir. 1967); *Fiswick v. U.S.,* 329 U.S. 211, 217 (1946); *Sondez v. U.S.* 239 F.2d 239 (9 Cir. 1956).

The Court also refused to give the jury a cautionary instruction during the course of the trial which counsel supplied in writing. Defendant contends he was entitled to this cautionary instruction (87-91).

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POINT II

THE COURT ERRED AND DENIED DEFENDANT A FAIR TRIAL BY ALLOWING HIGHLY PREJUDICIAL TESTIMONY ON THE ERRONEOUS GROUND IT WAS IN FURTHERANCE OF THE CONSPIRACY.

The Court allowed two substantial areas of testimony which were highly prejudicial and provocative to be admitted against the defendant on the erroneous grounds that the conspiracy to import was still in progress and the acts and statements were in furtherance of the conspiracy. Defense counsel objected in each instance.

Testimony was allowed on direct examination of Frank Rolli that Paul Zinerco told him while the two were alone at Zinerco's house that about September 10 Zinerco was beat up, a cord put around his neck, a gun put in his mouth, and he was threatened because it was believed he stole the box which the government confiscated on August 29, 1979.

Testimony was also allowed on direct examination of Frank Rolli that while Rolli and Zinerco were leaving the Santa Rosalia Club, Adamita said that if John Egitto were not trusted he should be eliminated i.e. killed. This was about September 15, 1979.

The testimony should not have been allowed for the following reasons:

1. The conspiracy to import was terminated no later than August 31, 1979 as explained above. The basic Rule is that before the co-conspirator's declaration will be admissible against his fellow conspirators it must be proved

that the declaration was made during the course of the conspiracy, See: *U.S. v. Smith,* 520 F.2d 1245, 1247 (8 Cir. 1975); *U.S. v. Jennings,* 527 F.2d 862 (5 Cir. 1976). The rationale for this requirement is that the conspirator can only be said to be speaking on behalf of his co-defendants if he was speaking at the time of and in connection with their joint project. *U.S. v. Borelli,* 336 F.2d 376, 396 (2d Cir. 1964). Since the conspiracy to import was defeated by the government on August 31, 1979 statements made after that date are inadmissible.

2. Neither Paul Zinerco's beating and his conversation concerning that beating with Rolli nor the statement by Adamita concerning the possible elimination of Egitto were in furtherance of the conspiracy to import heroin. They therefore should not be admissible against the defendant.

The general rule was stated in *Lutwak v. U.S.,* 344 U.S. 604, 617 (1953):

> "Declarations of one conspirator may be used against the other conspirator not present on theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party . . . ***But such declarations can be used against the co-conspirator only when made in furtherance of the conspiracy.***" (Emphasis added)

The Supreme Court retained the "in furtherance" requirement as did the drafters of the new Federal Rules of Evidence. See *U.S. v. Moore,* 522 F.2c 1068, 1077 (9 Cir. 1975); *Anderson v.*

U.S., 417 U.S. 211, 218, 94 S. Ct. 2253, 41 L.Ed.2d 20 (1974). The key question becomes was the statement made in furtherance of the conspiracy and was intended to be made in furtherance.

In order to be considered in furtherance of the conspiratorial objects the statement must be interpreted to promote, to advance and to help forward those goals. See: *Krulewitch v. U.S.*, 336 U.S. 440 (1949). See also: *U.S. v. Dennis*, 183 F.2d 201, 230 (2d Cir. 1950), aff'd. 341 U.S. 494 (1951) ("the enterprise must itself compromise making some such declaration as a step in its realization"); *U.S. v. Lekocas* 151 F.2d 170, 172 (2d Cir. 1945) rev'd on other grounds sub nom; *Kotteakos v. U.S.*, 328 U.S. 750 (1946) (Declarations become competent only when they are uttered in order to accomplish the common purpose") *U.S. v. Kelly*, 105 F.2d 912, 916 (2d Cir. 1939).

In addition, the hearsay statement must be made from one conspirator to another and must be contemplated by the conspiracy. See: *Dennis*, supra

(1) The testimony concerning the Zinerco beating on September 10, 1979.

> Rolli testified that several days after the meeting in Queens Zinerco called him and asked him to come to his (Zinerco's) home. Rolli stated that the two men proceeded to the backyard because Zinerco didn't want his wife to hear the conversation. When they reached the backyard Zinerco told Rolli that several men including people who had been present at the Queens house had beaten him up. Rolli recounted how Zinerco described the beating (i.e. the fact that these men tied him, put a rope around his neck and even put a gun in his mouth).

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This conversation cannot in anyone's imagination be construed in furtherance of a conspiracy to import. As previously stated we submit that the conspiracy to import terminated no later than August 31, 1979. This conversation evidences a falling out and break up of the original conspiracy. What had actually happened and is substantiated in the testimony is that the conspirators split into two factions following the seizure of the package by the government. (The Alitalia group Egitto, Rolli and Zinerco) were suspected of taking the package and converting it to their use for resale. The others were trying to recover the package from the co-conspirators who turned theives. The incident involving Zinerco was a result of the belief that Zinerco stole the box. The beating and threats show that the mutuality in the enterprise had dissolved as between the Alitalia Group and the others. In fact, while this was the strongest indication that the conspiratorial group had split, it was not the first evidence of that split. The first meeting on the Belt Parkway (i.e. at the gas station) and the meeting at the Queens house also showed the groups were working at cross-purposes.

The conversation and the incident it concerned was therefore not in the furtherance of the original conspiracy.

(2) The statement by Adamita that if Egitto could not be trusted, on about September 15, 1979, he should be eliminated.

Again the statement is made well after the conspiracy terminates. It also evidences a split in the conspiratorial group. Here a party brought into the picture by a member of the Alitalia group (Zinerco) comes in to aid Mr. Zinerco in his struggle with the members of the other group.

Zinerco recognized he was the main target of the other group (i.e. the person they believe responsible for stealing the package)

enlisted the aid of Mr. Adamita. Adamita's actions were to keep Zinerco from being hurt further. Adamita's statement concerning Egitto could not be considered in furtherance of the conspiracy to import.

Eliminating a co-conspirator was never within the contemplation of the conspiracy nor was it foreseeable by any of the parties.

CONCLUSION

Wherefore, it is respectfully submitted that the above sought after relief should be granted.

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